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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1211

SAM L. MACCORKLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES A. LOVE
1101 Security Building
Charleston, West Virginia

JOHN B. FISHER
Hecks Building
Charleston, West Virginia

JOHN A. AMICK
800 Terminal Building
Charleston, West Virginia

Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Sam L. MacCorkle, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered February 28, 1969, in Case No. 12,797, styled United States of America, Appellee, versus Sam L. MacCorkle, Appellant, (A. 1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Appendix hereto (A. 2). The Memorandum Opinion of the United States District Court for the Southern District of West Virginia, relating to the courts rulings on the pre-trial motions of petitioner, defendant therein, appears in the Appendix hereto (A. 6). No written opinion was rendered by the trial court.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the trial court, was entered February 28, 1969. This Court's jurdisdiction is invoked under 28 USC, Section 1254 (1), and by virtue of Rule 19 (b) of the Rules of this Honorable Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's ruling on petitioner's Motion to Dismiss the Indictment on the ground of pre-indictment delay, thereby depriving petitioner of Due Process of Law and a Speedy Trial in violation of the Fifth and Sixth Amendments to The Constitution of the United States of America?

2. Did the Court of Appeals err in affirming the District Court's ruling on petitioner's Motion to Dismiss the Indictment on the ground of post-indictment delay, thereby depriving petitioner of a Speedy Trial in violation of the Sixth Amendment to The Constitution of the United States of America?

3. Did the Court of Appeals err in affirming the District Court's refusal to charge the jury in accordance with petitioner's requested instructions numbers 10, 11, 12 and 13, bearing on the wilful element of the offenses charged in the indictment?

4. Did the Court of Appeals err in affirming the District Court's charge to the jury concerning the wilful element of the offenses charged in the indictment?

5. Did the Court of Appeals err in affirming the District Court's re-instruction of the jury concerning the wilful element of the offenses charged in the indictment?

6. Did the Court of Appeals err in affirming the District Court's refusal to charge the jury in accordance with petitioner's requested instructions numbers 3, 5, 6 and 9?

7. Did the Court of Appeals err in affirming the District Court's ruling in permitting the introduction in evidence of Government's Exhibits 9, 10, 112, 12, 13 and 14?

8. Is the Fourth Circuit's Order of February 28, 1969, supported by applicable principles of law and evidence?

9. Did the Court of Appeals err in affirming the District Court's rulings on all other errors assigned?

STATUTORY PROVISIONS AND RULES INVOLVED

Title 26, Section 7203, United States Code; Title 18, Section 3237, United States Code; and Rule 48 (b), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Defendant, the former Assessor of Kanawha County, West Virginia, residing in Charleston in the Southern District of West Virginia, was indicted by a Grand Jury in the Northern District of West Virginia, at Elkins, West Virginia, on the 25th day of March, 1966, and charged with the violation of Title 26, Section 7203 of the United States Code in a five count Indictment alleging that he wilfully and knowingly failed to file his personal income tax returns timely for the years 1959, 1960, 1961, 1962, and 1963. The indictment contained a separate count for each of the respective years.

The Court ordered the proceeding transferred to the Wheeling, West Virginia, Division of the United States District Court for the Northern District of West Virginia. The defendant, petitioner herein, appeared, in person and by counsel, before the United States District Court for the

Northern District of West Virginia, at Wheeling, on the 4th day of April, 1966, and moved the Court to transfer the action to the Southern District of West Virginia, the petitioner's place of residence, for further proceedings. The Court took the motion under advisement and informed both counsel for petitioner and the District Attorney that he would advise them concerning the future course of the case after he had time to study the law and authorities thereon. No official action of record was taken thereafter until the 16th day of August, 1967, when counsel for petitioner received a letter from the Clerk of the Northern District advising that the Honorable Eugene A. Gordon, Judge of the United States District Court for the Middle District of North Carolina, had been designated to sit in this matter.

Thereafter, Judge Gordon by letter directed counsel to file all desired motions and pleadings on or before the 28th day of September, 1967. The desired motions and pleadings were filed as directed, and petitioner appeared before Judge Gordon at Wheeling on the 9th day of October, 1967, as further directed. Whereupon, The Court after studying Petitioner's Motion to Transfer, and after having heard the arguments of counsel and reviewing the authorities cited in connection therewith, ordered the matter transferred to the Southern District of West Virginia for further proceedings.

Immediately thereafter petitioner moved the District Court for the Southern District of West Virginia to grant him a speedy trial and to require the Government to proceed with its prosecution without further delay. The Court set the 20th day of December, 1967, for hearing the matters arising on the pre-trial motions filed as aforesaid and, after mature consideration and having heard the arguments of both counsel for petitioner and the Government, ordered the

indictment dismissed because an improperly constituted Grand Jury returned the said indictment.

On the 18th day of January, 1968, petitioner was again indicted by a Grand Jury of the United States District Court for the Northern District of West Virginia, at Wheeling, and on the 31st day of January, 1968, petitioner appeared in person and by counsel at Wheeling and again moved that Court to order the matter transferred to the Southern District of West Virginia for further proceedings. The Judge of that Court, the Honorable Robert Maxwell, immediately ruled thereon and ordered the proceeding transferred.

Petitioner immediately filed in the Southern District, at Charleston, pre-trial motions identical with the ones filed in the former proceedings, and that Court set the 2nd day of April, 1968 for hearing thereon. The Court overruled a majority of petitioner's motions, and set the matter for trial on the 29th day of July, 1968. The Court later filed its Memorandum Opinion, dated April 25, 1968, containing its rulings on said motions. Petitioner was tried on the 29th, 30th, and 31st days of July, 1968, and on the 31st day of July, the jury returned its verdict of guilty on all five counts of the indictment. Thereafter, petitioner moved the Court to set aside the verdict and to award him a new trial, and to arrest judgment on the verdict assigning grounds therefor, which the Court subsequently overruled, and on the 3rd day of September, 1968, the Court imposed sentence upon the petitioner. Thereafter, petitioner appealed to the United State Court of Appeals for the Fourth Circuit, and this petition follows that court's order and opinion entered on the 28th day of February, 1969.

Petitioner's uncontroverted testimony clearly establishes that an Agent of the Internal Revenue Service called upon

him at his home in the month of September, 1964, to inquire whether he had filed personal income tax returns for the years set forth in the indictment, and that petitioner forthwith informed him that he had not filed the same (A. 40). However, the indictment, subsequently dismissed, was not returned by the Grand Jury until the 25th day of March, 1966, some 82 weeks or almost 19 months thereafter. Petitioner appeared to answer the indictment on the 4th day of April, 1966, and moved the Court, in writing, to transfer the proceeding to the Southern District of West Virginia. The Court stated that it would take the motion under consideration, and, after considering the law in that regard, would advise the parties of his ruling (A. 68). However, it was not until the 9th day of October, 1967, after a period of approximately 78 weeks or 18 months, that the Honorable Eugene A. Gordon, United States District Judge for the Middle District of North Carolina, acting Judge for the Northern District of West Virginia, ruled on said motion and ordered the proceedings transferred to the Southern District of West Virginia.

On the 20th day of December, 1967, the Honorable John A. Field, Jr., Judge of the United States District Court for the Southern District of West Virginia, at Charleston, dismissed the indictment on petitioner's motion previously filed on the 28th day of September, 1967, pursuant to Judge Gordon's instruction, on the ground that the Grand Jury that returned the same was improperly constituted.

On the 18th day of January, 1968, a new indictment was returned against petitioner in the United States District Court for the Northern District at Wheeling, and upon the 31st day of January, 1968, the proceeding was again ordered transferred to the Southern District of West Virginia, upon petitioner's motion. Shortly thereafter the petitioner again moved to dismiss the indictment on the ground

that the unreasonable delay in prosecution had deprived him of Due Process of Law and a Speedy Trial in violation of the Fifth and Sixth Amendments to The Constitution of the United States of America, and, pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure. A hearing was held on petitioner's motions on the 2nd day of April, 1968, and the Court ruled on the same a short time thereafter and filed its Memorandum Opinion (A. 6). The total elapsed time from the instigation of the Government's prosecution against petitioner to the date the second indictment was returned against him totalled 177 weeks or 39 months. The post indictment delay, from the date the original indictment was returned until the Court ruled on the motion to dismiss because of the delay, totalled 107 weeks or 24 months.

The trial of petitioner commenced on the 29th day of July, 1968, and, pursuant to the direction of the Trial Judge, petitioner submitted a list of requested instructions to be considered by the Court in connection with his charge to the jury. Requested Instructions Nos. 10, 11, 12, and 13 related to the wilful element of the offenses charged in the indictment, and were refused by the Court (A. 62). Requested Instructions Nos. 3, 5, 6, and 9, relating to the presumption of innocence, reasonable doubt, and conflict of evidence, were refused by the Court (A. 60). The Court disagreed with petitioner's contentions and theory of the case in this regard, and charged the jury with the law applicable to the case in his belief. Subsequently the jury retired to consider its verdict, but later returned to the Court and requested re-instruction on the wilful element of the offenses charged. Thereupon the Court re-instructed the jury on the element of wilfulness, over petitioner's objection and contrary to his requested instructions.

During the trial the Court permitted the Government, over petitioner's objection, to introduce into evidence Government's Exhibits Nos. 9, 10, 11, 12, 13 and 14, those being income tax returns filed in years prior to those set forth in the indictment.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THERE WAS NO UNREASONABLE PROLONGATION OF THE PRE-INDICTMENT INVESTIGATION OF PETITIONER IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS, AS WELL AS ITS OWN PRIOR DECISIONS.

In order to determine whether the delay was reasonable or unreasonable, the Court must first know the reason or reasons that occasioned it. Moreover, counsel believes that the various Courts are unanimous in holding that when an issue of delay of some magnitude is raised, the burden of proof is upon the Government to justify it. In the instant case the Government not only failed to sustain its burden of proof in this regard, it admits that it does not know the reasons for the delay, if any. The only explanation offered for the pre-indictment delay in this case is the Assistant District Attorney's statement to the Court, made in reply to this issue when referring to the investigation conducted by the Internal Revenue Agent. * * * "He couldn't drop all of his work and start on this one particular case. These agents have many duties and many cases to work and they work them as best they can under the circumstances. This is the only explanation I can give for the delay prior to indictment." (Tr. 50-4/2/'68). Thus, it is clear that no explanation whatsoever has been made for pre-indictment delay, and no showing that it was reasonable.[1]

[1]This appears to be particularly true in light of the Court's statement in the case of Lenske vs. U. S., 66-2 U. S. T. C. 9686, wherein the government, as in the instant case, resisted the defendant's motion for a bill of particulars. The trial judge said, "The government is the strongest litigant in the world. You have got the FBI and all the government agencies available to you. You represent the strongest client in the world."

Pre-indictment delay was thoroughly gone into the case of Nickens vs. United States, 323 F. 2d 808, wherein the defendant was convicted on a narcotics charge. The Court of Appeals, D. C., said:

"(1) (1) Appellant's claim relating to the delay between the date of the offense and the commencement of the criminal prosecution is not covered by Rule 48 (b) of the Federal Rules of Criminal Procedure. Harlow vs. United States, 301 F. 2d 261, 266 (5th Cir.), cert., denied, 371 U. S. 814, 83 S. Ct. 25, 9 L. Ed. 2d (1962); Hoppengarner vs. United States, 270 F. 2d. 465, 469 (6th Cir. 1959); United States vs. Hoffa 205 F. Supp. 710, 720-721 (S. D Fla. 1962), or by the Sixth Amendment, but rather it relates to the running of the applicable statute of limitations." * * *

Circuit Judge Wright, in a concurring opinion filed therein, details the position taken by defendant in this proceeding.

* * * "Delay in bringing a complaint may violate Sixth Amendment rights. This Court, without dissent, said only last year: "(T) he constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Provoo, Infra. seems to have settled the point. See also our opinion in Taylor, infra. In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of constitutional rights, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive,' Pollard vs. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 1 L. Ed. 2d 393, even an indictment within the limitation period may come too late to square with the Sixth Amendment." Mann vs.

United States 113 U. S. App. D. C. 27, 29-30, N. 4, 304 F. 2d 394, 396-397, n. 4 (1962), cert. denied, 371 U. S. 896, 83 S. Ct. 194, 9 L. Ed. 2d 127 (1962). See United States vs. Provoo, supra; Taylor vs. United States, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956). That the delay in doing justice in this case occurred between offense and formal complaint rather than between complaint and indictment or indictment and trial, does not immunize it from the constitutional command. The right of a suspect to speedy determination of guilt or innocence is not lost merely because the delay in the process occurs before the formal charge, rather than after. Mann vs. United States, supra.

Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

* * * "In some types of criminal prosecution of course, delays before complaint will often be unobjectionable. When involved investigation, difficult prosecutory decisions, or complex preparations for the grand jury are necessary, the delay may be warranted. When the authorities are unsure against whom to proceed, or doubtful of the adequacy of the case, then, of course, no formal charges should be brought. But when there is no such necessity, there should be no delay. In this case, where the testimony of an officer and an informant was in hand and nothing more re-

mained to be done but the signing of a formal charge, the delay of seven and a half months before that step is a circumstance demanding explanation.

"The trial court here quite properly put the burden on the Government to justify the delay. The government must show that "there was no more delay than is reasonable attributable to the ordinary processes of justice." Williams vs. United States, 102 U. S. App. D. C. 51, 53, 250 F. 2d 19, 21 (1957) (opinion of Judge Brazelon). The explanation offered at trial for not making an immediate arrest at the time of the illegal transaction was the desire of the narcotics agent to effect a second transaction a few days later. But when the attempt at such a second sale was unsuccessful, still no charge was made. The Government explains the continued delay by the need not to expose the undercover identity of the agent, who continued at work in the Washington Area attempting to secure evidence against others. But it does not appear that the agent continued this undercover work until the date of the complaint eight months later, for, at some time in this period, he left Washington to do similar work in New York. Moreover, in March he exposed his role here by signing complaints against other addicts. Still no complaint was made against appellant until May. At least this final delay to two months seems longer than "reasonably attributable to the ordinary processes of justice." In the circumstances of this case, however, it may be proper to defer to the determination of the trial court on this question.

"A showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. Taylor vs. United States, supra; Petition of Provoo, supra, at 203; United States vs. Lustman, 2 Cir., 258 F. 2d 475 (1968), cert. denies, 358 U. S. 880, 79 S. Ct. 118, 3 L. Ed 2d 109 (1958). On the contrary, the

Government bears the burden of proving "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay." Williams vs. United States supra, 102 U. S. App. D. C. at 53, 250 F. 2d at 21."

* * *

See also, Ross v. United States, 349 F.2d 210, U. S. App. D. C., 1965; Woody v. United States, 370 F.2d 214, U. S. App. D. C., 1966; *United States v. Harbin, 377 F.2d* 78, 4 *Cir.*, 1967; Chapman v. United States, 376 F.2d 705, 2 Cir., 1967; Terlikowski v. United States, 379 F.2d 501, 8 Cir., 1967; United States v. Feinberg, 383 F.2d 60, 2 Cir., 1967.

Clearly, no involved investigation was conducted in the instant case, as is shown by an examination of the evidence introduced at the trial. Every bit of evidence was in the hands of the Government on the first day of its investigation. Counsel cannot imagine that there were any difficult prosecutory decisions to be made, complex preparations necessary for the Grand Jury, or that the Government was unsure against whom to proceed in this case. In addition to questioning why there was such a delay in obtaining an indictment, there remains a question concerning why the Government sought an indictment in the first place. This matter involved a misdemeanor, and, therefore, it would seem most reasonable, certainly expedient, that petitioner be proceeded against by an Information. There is little satisfaction to be had from the Assistant District Attorney's answer to the question of the District Court on this point. He said, "Your Honor, I cannot answer that question." Indeed, the answer would seem to require dismissal of the indictment.

Although, as the Court said in Nickens v. United States, supra, no showing of prejudice is necessary when asserting a constitutional right under the Sixth Amendment, it

should be remembered that petitioner was a duly elected public official, the Assessor of Kanawha County, West Virginia, at the time the prosecution was instigated. Petitioner's uncontradicted testimony clearly shows that the prosecution was brought about at the behest of a local newspaper (A. 40), and the testimony of a witness for the defense clearly shows the effect on the petitioner. He was under a continuous public indictment because of the explosive nature and frequent and repetitious news releases of the various media from September, 1964 until the first legal indictment was returned in March, 1966, some 18 months (Tr. 17, 18—4-2-'68). Consequently, obviously prejudice to petitioner was present throughout the delay, and afterwards.

II. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THERE WAS NO UNREASONABLE POST-INDICTMENT DELAY OR DENIAL OF A SPEEDY TRIAL IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS, AS WELL AS ITS OWN PRIOR DECISIONS.

The petitioner moved the trial court to dismiss both of the indictments returned against him on the ground of unreasonable post-indictment delay, resulting in the deprivation of a speedy trial in violation of the Sixth Amendment of the Constitution of the United States of America. The facts in this case compare closely with the facts in the case of Hanrahan, v. United States, 348 F.2d. 363, decided by the United States Court of Appeals for the District of Columbia Circuit on June 24, 1965. In both cases the original indictments were dismissed after some considerable delay; in each case the defendants moved for a speedy trial prior to the dismissal of the indictment; in both cases the defendants were re-indicted; in both cases the defendants again moved for dismissal on the ground of unreasonable delay, and they were again overruled; and in both cases the defendants were tried, convicted and appealed. Here the com-

parison ends, because the Court of Appeals reversed the District Court in the Hanrahan case. In that case, the defendants were indicted in Puerto Rico in July, 1959. They moved for a Change of Venue and it was granted in May, 1960. They were arraigned in August, 1960, and trial was set for October. The Court granted the government a continuance until November of that year.

However, in October the government moved for a further continuance, stating that it expected to dismiss this Indictment and obtain a new one, and the Court granted the continuance without limitation. Seventy-six (76) weeks later a new Indictment was returned, whereupon the defendants moved to dismiss it for lack of a speedy trial. Their Motion was overruled, the trial started in January, 1963, and the defendants were convicted and subsequently appealed. The Appellate Court held:

"(1), Rule 48 (b), FED. R. CRIM. P., if not the Sixth Amendment, in terms requires the prosecutor to proceed without "unnecessary delay." The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun. Nickens vs. United States, 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), cert. denied, 379 U. S. 905, 85 S. Ct. 198, 13 L. Ed. 2d 178 (1964), does not hold otherwise, if indeed it could in the face of the language of Rule 48 (b). Therefore, the critical question in this case is, not when was the indictment filed, but when was the prosecution commenced." * * *

* * * "(3, 4,) In curtailing the length of criminal prosecutions, the law recognizes certain interests of the person accused and attempts to protect those interests. Speedy trial provisions seek, first, to prevent lengthy pre-trial imprisonment where the accused is unable to make bail, or pre-trial restriction of movement when bail is available. Second, and

perhaps equally important, these provisions seek to minimize the anxiety and attendant evils which are invariably visited upon one under public accusation but not tried. Finally, they seek to insure that the ability of the accused person to answer the charge will not be impaired on account of lost witnesses and faded memories due to the passage of time. In this case, these protected interests were threatened by a public accusation of mail fraud which went unresolved for close to four years." * * *

* * * "Two questions, however, arise from this record which went unanswered in the trial court because of the court's failure to consider the time preceeding the second indictment. First, did the prosecutor exercise reasonable diligence in seeking the second indictment? At the time Government counsel announced his intention to dismiss the Puerto Rican indictment in favor of a new indictment, he estimated that the process would take about six weeks. The actual time elapsing from the date of that estimate to the return of the second indictment proved to be seventy-six weeks —roughly twelve times the original estimate. This disparity demands explanation.

"Even if satisfactory explanation is forthcoming, however, a second question remains. It is highly probable that the prosecution of this case would have been shortened by as much as two years if the original indictment had been brought in the District of Columbia, where appellant lived and where the offense centered instead of in Puerto Rico. Moreover, it is arguable that reasonable regard for the interests of the accused might have compelled the Government to anticipate the appellants could not be speedily and fairly tried in a distant place where many of the people spoke no English and where adverse feeling against outsiders charged with defrauding local businessmen were certain to have some effect. Discretion existed in law, it is true,

to bring the original prosecution in either the District of Columbia or Puerto Rico. But why was that discretion exercised by bringing the prosecution in Puerto Rico? If the decision to prosecute in Puerto Rico rather than in the District of Columbia was a deliberate choice made for a supposed advantage, then the delay directly resulting from the choice must be considered in appraising appellants' speedy trial claim.

"The record in this case, voluminous as it is, is not sufficient to enable us to resolve the question raised by appellants' denial of speedy trial claim, nor should we decide them in the first instance on appeal. Therefore the case must be remanded for further proceedings. If the court should find that all the delay attributable to the prosecutor was necessary for fair and just prosecution of the charge of mail fraud, then the convictions will stand. If, on the other hand, the court should find that the prosecution was conducted with such disregard of appellants' interest that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay," then appellants' Sixth Amendment rights have been denied and the conviction must be vacated and the indictments dismissed. Finally, if no constitutional violation is found, but unnecessary delay under Rule 48 (b) is present, then the decision whether to vacate and dismiss lies within the sound discretion of the trial court. In exercising that discretion the court should consider the prejudice resulting from possible loss of evidence as well as the hardships appellants might have suffered by reason of the delay in the prosecution." * * *

The Fourth Circuit decided the case of Pitts v. State of North Carolina, 395 F. 2d 182, on April 1, 1968. In the

opinion handed down in that case, the Fourth Circuit approved the principles set forth in Hanrahan v. United States, supra, and Nickens v. United States, supra, as well as many others cited in those cases. There the Fourth Circuit clearly points out that the burden is upon the Government to prove that the "accused suffered no serious prejudice beyond that which ensues from ordinary and inevitable delay." In the instant case, the Fourth Circuit completely ignores its decision in Pitts, supra, although specifically called to its attention. The same is true of the case of United States v. Harbin, 377 F. 2d 78, decided by the Fourth Circuit in 1967.

See also United States v. McWilliams, 163 F. 2d 695, U. S. App. D. C., 1947; Fields v. United States, 370 F. 2d 141, 4 Cir., 1966; United States v. Banks, 370 F. 2d 141, 4 Cir., 1966; and United States v. Choate, 276 F. 2d 724, 86 ALR 2d 1337, 1343-1350.

The District Court for the Southern District of West Virginia, in its Memorandum Opinion (A. 11), on Page 6 thereof, seems to indicate that by questioning the makeup of the Grand Jury that returned the original indictment against the petitioner, which the court subsequently dismissed for the reasons previously stated, the petitioner waived or somehow lost his right to press the issue of the government's post-indictment delay. Counsel do not believe that the petitioner is to be deprived of one constitutional right because of asserting another constitutional or statutory right. Again, in the case of Pitts v. North Carolina, supra, the court held: "Every reasonable presumption will be indulged against waiver of fundamental constitutional rights."

Looking at the facts of this case again, why would the petitioner ask for a speedy trial prior to a ruling being giv-

en on his motion to transfer? To begin with he didn't know where the trial would be held! On the other hand, to press for a speedy trial prior to such ruling would be tantamount to asking the Court to overrule his motion to transfer. But finally, and most respectfully, to whom would petitioner have addressed such a motion or request? The regular judge for the Northern District Court of West Virginia had disqualified himself, and no other judge had been designated to sit in the matter. Again, why should the petitioner be required to perform a useless act, and move the Court for a speedy trial? In addition, counsel is unaware of any Rule or ruling requiring such a motion while a prior undecided motion is still pending before the court. If one can not obtain a decision on the first, why would he be required to seek an answer to a second one.

The District Court further indicated in its Memorandum Opinion (A. 11), on Page 7 thereof, that it believed the petitioner occasioned the delay, and said, "but I do not believe they are entitled to any advantage of alleged constitutional delay in the prosecution which necessarily resulted by reason of the motions which were filed." Deferentially, the petitioner did not cause the delay in ruling on his motion to transfer to his home district. The question still remains to be answered as to what brought about the delay from March 25, 1966, to the 28th day of September, 1967, when the other motions and pleadings were filed. We respectfully suggest that neither petitioner nor his counsel could have occasioned this delay.

Further, in this connection, petitioner's counsel made no motion to disqualify the Judge of the United States District Court for the Northern District of West Virginia, at Wheeling, and in fact, by the motion to transfer, asked him to act. Hence, the delay caused by the disqualification of the regular Judge is not to be charged to petitioner, who

was led to believe that a ruling would be forthcoming within the immediate future, as shown by the Transcript (Tr. 6-4/4/'66). Even now, petitioner does not know when nor why the regular Judge disqualified himself. However, in making this statement, counsel imputes no impropriety to the District Judge, other than delay.

III. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA DID NOT ERR IN REFUSING TO GIVE PETITIONER'S REQUESTED INSTRUCTIONS NOS. 10, 11, 12 AND 13, IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER COURTS OF APPEALS.

Pursuant to the trial court's direction, petitioner submitted several requested instructions. Instruction No. 10, (A. 62) refused, is as follows:

"The Court instructs the jury that the Indictment returned against the defendant Sam L. MacCorkle in this case charges five separate and distinct offenses. First, that he wilfully and knowingly failed to file his income tax return for the calendar year 1959 on or before the 15th day of April, 1960; second, that he wilfully and knowingly failed to file his income tax return for the calendar year 1960 on or before April 15, 1961; third, that he wilfully and knowingly failed to file his income tax return for the calendar year 1961 on or before April 15, 1962; fourth, that he wilfully and knowingly failed to file his income tax return for the calendar year 1962 on or before the 15th day of April, 1963; fifth that he wilfully and knowingly failed to file his income tax return for the calendar year 1963 on or before the 15th day of April, 1964.

"The elements of each of the five offenses charged in the indictment that the Government must prove to your satisfaction beyond all reasonable doubt are as follows:

"First, that the defendant's income was sufficient in each of the said years, that is that it was in excess of $600.00 in each of said years, to require him to file a return. It has been stipulated in this case, and thus it is admitted by the defendant that his income was sufficient in each of said years to require him to file an income tax return. Second that the defendant knew or should have known that he was required to file an income tax return in each of the said years. Again, it has been stipulated and the defendant thereby admits that he knew he was under a duty to file such returns at the time hereinabove referred to. Third, that he failed to file such returns timely. Again it has been stipulated and the defendant admits that he failed to file such returns timely. Fourth, that the defendant's failure to file his returns timely was wilful. This element of the offense is denied by the defendant. Therefore, the sole issue for your determination as to each of the offenses charged in the indictment is whether or not the defendant wilfully failed to file his returns on time.

"In considering whether or not the defendant wilfully failed to file his income tax returns as charged in the Indictment, you should not ignore or overlook the word "wilful" nor its meaning. A wilful failure to perform an act is to omit the doing of such act with an "evil motive" or "bad purpose". Mere laxity, inadvertence, careless disregard of the duty imposed by law, negligence, or even gross negligence on the part of the defendant, unattended by evil motive or bad purpose, is not sufficient to establish the element of wilfulness.

"Therefore unless the Government has proved that the defendant's failure to file his returns was wilful, to the exclusion of every reasonable doubt, you must find the defendant not guilty. United States vs. Palermo 259 F 2d

872; Lumetta vs. U. S. 362 F 2d 644; U. S. vs. Vitiello 363 F 2d 240."

The Court apparently believed that the instruction did not clearly state the law, for at least two reasons. That instruction attempted to tell the jury that there were four elements of the offense to be proved, and that "knowledge" on the part of the defendant, that he was required to file such return, was a separate element. However, the Court charged the jury that there were only three essential elements, obviously believing that "knowledge" was part of the element of "wilfulness". The Court said (A. 74).

"And Thirdly,—that the failure to file such income tax return was wilfully and knowingly done.

"Ladies and Gentlemen of the Jury, all three of these elements as to each Count are necessary to be proved by the Government beyond a reasonable doubt. * * *"

The Court further charged the jury as follows: (A. 75).

"* * * Now, the third element is where the controversy is in this Case—the third essential element which the Government is required to prove beyond a reasonable doubt, in order to establish the offense charged in the indictment is that the Defendant failed to file the income tax returns within the time required by law; that the failure was wilfully and knowingly—now, the word, "wilful" has a number of different meanings, depending on the context in which it is used. As it is used in the Statute which I have read to you and the one that is involved in this Case, "wilful" means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, for that matter, is not sufficient to constitute wilfulness. It means an act done

with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, or perversely, with bad motive and with a specific and wrongful intent. In other words, a failure to act is wilfully done if done voluntarily, purposefully, and with a specific intent to fail to do what the law requires to be done; that is to say, with bad purpose, either to disobey or bad motive to disregard the law. *I charge you that the only bad purpose necessary for the Government to prove in this Case, is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them.*" (Emphasis supplied)

Counsel believes this interpretation of the law to be incorrect. Surely one could know of a legal requirement to perform an act and fail to perform it without such failure being wilful. This point is raised because it is believed that the jury was given the impression that the defendant's failure to file his return was wilful, simply because he knew he should do it and failed.

If the Court's charge to the jury concerning the element of wilfulness was correct in other respects, then the last sentence of that portion of the charge destroyed, or "pulled the teeth" from it. The Court said:

"I charge you that the only bad purpose necessary for the government to prove in this Case is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them."

It is believed that this portion of the charge overrode anything else that the Court said or could have said in this connection, and that, as such, had more influence on the jury's verdict than any other aspect concerning their finding of wilfulness.

In the case of United States vs. Murdock, 290 U. S. 389, 78 L. Ed. 381, the defendant intentionally and deliberately refused to supply information in violation of Section 256 of the Revenue Act of 1926, and Section 148 of the Revenue Act of 1928. The Court held:

"* * * The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

Secondly, the Court refused to use the word "evil" in its charge concerning the defendant's motive or purpose. Counsel believes that the word "evil" should have been used in the charge, and that such word carries with it a connotation much stronger than the word "bad". Counsel objected to this portion of the Court's charge (Tr-236-7/29/68). United States vs. Murdock, supra; Spies vs. United States, 317 U. S. 492, 87 L. Ed. 418; United States vs. Palermo, 259 F. 2d 872; United States vs. Vitiello, 363 F. 2d 240.

Defendant's Requested Instruction No. 11 was offered for two purposes. First, it defined "evil motive" and "bad purpose". Secondly, it would have submitted the question of absence of "evil motive" to the jury. The instruction is as follows:

"The Court instructs the jury that before you may find that the defendant's conduct in failing to file his tax returns timely was wilful, it is essential that you first determine that his motive was evil, and that he failed to file them for some bad purpose.

"Evil motive is defined as that which leads or tempts the mind to indulge in a criminal act or omission, or as the moving power which impels for a definite result. Bad purpose is the result intended to stem from an evil motive. Evil mo-

tive and bad purpose are facts that may be inferred by you, not merely from the circumstances attendant to the defendant's omissions, but, in conjunction with these, from all previous occurrences having reference to, and connected with, the offenses charged in the Indictment.

"Therefore, you are further instructed that if, after having heard and considered all of the evidence in this case you have a reasonable doubt as to the existence of, or are convinced of the absence of an inducing evil motive and bad purpose for the defendant to commit the offenses charged in the Indictment, you must find the defendant not guilty.

United States vs. Palermo, 259 F 2d 872; Lumetta vs. U. S., 362 F 2d 644; U. S. vs. Vitiello, 363 F 2d 240." (A. 64).

Clearly the Court charged the jury that it was to consider the defendant's purpose or motive. It seems that a definition of motive or purpose would necessarily follow.

Concerning the absence of "evil motive", such an instruction was offered in United States vs. Murdock, supra; the Court ruled that such an instruction was proper.

"* * * The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish wilful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctively upheld the respondent's right to have the question of abence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose."

In the present case, the Court said of Wilfulness" * * * it means an act done with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, or

perversely, with bad motive and with a specific wrongful intent * * *".

In light of the decision in Spies vs. United States, supra, this instruction appears to have been rejected. That case clearly distinguishes between intentional and wilful failure to perform an act.

In United States vs. Palermo, 259 F. 2d 872 at 880, the Court said:

"In Forster vs. United States, 9 Cir., 1956, 237 F. 2d 617, also a Section 145 (b) case, the trial judge initially properly charged the jury on the score of wilfullness. However, in granting further instructions to the jury, at its request, it charged as follows:

" 'When used in a criminal statute—that is, the word "willful" or "willfully"—when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.

" 'The word is also characterized—employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act." (Emphasis supplied.)

'With respect to these additional instructions the appellate court, after observing that they were 'verbatim from United States vs. Murdock' (supra) held that they were erroneous and reversed.

"We have referred to these cases in some detail because they demonstrate that the District Court in the instant case applied an erroneous standard in determining "wilful" failure to pay.

"(2) As earlier pointed out the District Court was guided to its finding of willfulness by the definition of

"willful" as stated in the Murdock case. Because it found that defendant's failure to pay taxes on time "was stubborn, obstinate, and perverse"; he acted "without justifiable excuse"; "his conduct was marked by a careless disregard" and "there was a want of justification", it made the ultimate fact-finding of willfulness.

"The factor stated, neither singly or cumulatively, are self-sufficient to establish "willfulness" under Section 145 (a). Forester vs. United States, supra. Nor does even "gross negligence" do so."

Defendant's Requested Instruction No. 12 was taken from the language in the Palermo Case, supra. (A. 65).

"The Court instructs the jury that although the defendant, Sam L. MacCorkle, admits that he was required to file the income tax returns alleged in the Indictment, that he knew he was required to file them, and that he failed to file them within the time prescribed by the law, and the jury believes that his failure to file his returns timely was caused by his laxity, negligence, gross negligence, inadvertence, or that it was intentional and without legal justification on the part of the defendant, nevertheless, if you have a reasonable doubt as to whether such failure was prompted by an evil motive or bad purpose on the part of the defendant, then you must return a verdict of not guilty in this case."

The effect of such instruction was to tell the jury that regardless of whether the defendant's failure was the result of a negligent or intentional omission, if they did not believe that it was prompted by evil motive or bad purpose they could not convict. Once again, it is in direct opposition to the Court's charge.

Defendant's Requested Instruction No. 13 was also taken from the language of the Palermo case, supra. It in effect

told the jury that although the defendant's conduct established a pattern of behavior, that without additional evidence of some evil motive or bad purpose they could not convict (A. 65).

In United States vs. Vitiello, 363 F. 2d 240, at page 242, the Court said: "Willfulness * * * requires evidence of a specific wrongful intent—an evil motive—at the time the crime charged was committed * * *. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'willfulness.' ".

IV. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA DID NOT ERR IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF GOVERNMENT'S EXHIBITS NUMBERS 9, 10, 11, 12, 13, AND 14 IS A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner objected to the introduction of Government's Exhibits Nos. 9, 10, 11, 12, 13, and 14, but was overruled (Tr-89, 90 & 91-7/29/69). Exhibit No. 9 was defendant's income tax return for the year 1958, and Exhibits 10, 11, 12, 13, and 14 were his income tax returns for the years 1957, 1955, 1954, 1953, and 1952. (Tr. 93-99-7/29/68). The evidence clearly shows that the returns for the years 1955, 1956 and 1957 were timely filed, although the returns for the years 1954, 1953, and 1952 were filed late. Upon reflection, counsels' objection to the introduction of Government's Exhibit No. 9, the 1958 return, may have been hasty. However, this is not so for the years 1952 through 1957. The latter three were filed timely, while the former were late. The only purpose given for the introduction of

these prior returns was an attempt to show a "pattern of behavior". This is reflected in the Court's charge to the jury (A. 76). Counsel does not believe that these prior returns show a "pattern of behavior". On the contrary, they clearly show that there was no such pattern. Counsel will agree that petitioner's late filing for the years 1959 through 1963, and perhaps 1958, could conceivably justify the Court's charge concerning a "pattern of behavior". Not so with the others! Would a late filing in 1935, again in 1945, and again in 1965, with timely filings in between, justify a "pattern of behavior" charge in 1968? Surely there is some limitation to be placed upon such evidence. Justice demands it! In the instant case, if the years 1958 through 1963 were insufficient to establish such a pattern, then the years 1952, through 1954 could not. And what of the timely filings in 1955, 1956 and 1957? This evidence could only inflame, mislead or prejudice a jury, while having no probative value whatsoever. While the "pattern of behavior" cases are numerous, no authority has been found to justify this evidence.

As a matter of fact, the record shows (Tr. 174-7/29/'68) that affidavits were appended to the 1952, 1953, and 1954 income tax returns stating that the reason for the late filing was "over-sight with no intention to violate the law or evade the payment of tax due", and that they were signed and notarized before one Richard E. Evans, Internal Revenue Agent, who also signed them. What possible connection could these exhibits, or the testimony concerning them, have bearing on the theory of "pattern of behavior"? Petitioner's objection to the introduction of this evidence was overruled by the court (Tr. 88-7/29/'68).

V. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT DID NOT ERR IN REFUSING TO GIVE PETITIONER'S REQUESTED INSTRUCTIONS NUMBERS 3, 5, 6 and 9 SANCTIONED A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL

PROCEEDINGS, SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION, AND IS NOT SUPPORTED BY APPLICABLE PRINCIPLES OF LAW AND EVIDENCE.

Petitioner's Requested Instruction No. 3 embodied the theory that proof beyond all reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with his innocence, was necessary before the jury could convict. This instruction is normally considered a stock instruction to be given only in circumstantial evidence cases. It was refused by the Court (A. 60).

Petitioner's Requested Instruction No. 5 is believed to have been particularly appropriate in this case. It is as follows:

"5. The Court instructs the jury that every fact necessary to constitute the offense charged must be proven beyond a reasonable doubt and that if there is a reasonable doubt as to any such fact, you shall acquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused; that the jury is not at liberty to guess, and where a fact is susceptible of two interpretations, one of which is consistent with innocence of an accused, they cannot arbitrarily adopt the interpretation which incriminates him. 142 Va. 655, 128 S.E. 459." (A. 61).

This instruction went to the very heart of the Government's case. The Government was able to show merely that the petitioner, knowing he was required to file the returns, failed to file them timely. The only evidence offered in support of the willful element of the crime pertained to "pattern of behavior." In opposition, the petitioner testified that his failure was through negligence and inadvertence, not intentional. Therefore, if this instruction had been given, the jury could not possibly have adopted the interpretation of the evidence necessary to convict.

Petitioner's Requested Instruction No. 6 is thought to be a companion instruction to No. 5. It would have told the jury that "if you believe there is any conflict as to the material evidence in this case, a part of which tends to establish the innocence of the accused, and a part of which tends to establish his guilt, and the jury has a reasonable doubt as to which is true, the jury is instructed that it is your duty in that event, in arriving at your verdict, to adopt the evidence, theory and conclusion which is most favorable to the defendant, since the defendant is entitled to the benefit of every reasonable doubt as to his guilt or innocence of the crime charged against him. 89 W. Va. 301, 109 S.E. 326." (A. 62).

Petitioner's Requested Instruction No. 9 simply told the jury that "if there was any one essential fact proved to the satisfaction of the jury which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt, and the jury should find the defendant not guilty. 47 W. Va. 267, 34 S.E. 734." (A. 62).

It is not believed that the Court's charge to the jury embodied these basic theories of the law concerning the rights of the accused, and that if they had been given the result would have been different.

VI. THE FOURTH CIRCUIT'S OPINION AND JUDGMENT THAT THE DISTRICT COURT DID NOT ERR IN ITS RULINGS ON ALL OTHER ERRORS ASSIGNED IS NOT SUPPORTED BY APPLICABLE PRINCIPLES OF LAW AND EVIDENCE.

Although petitioner believes that the other errors assigned to the Court of Appeals are sound, petitioner does not believe it is necessary to elaborate on them at this time; however, if the Court is so desirous, petitioner will comply forthwith.

CONCLUSION

For the reasons assigned, petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the Opinion and Judgment of the Fourth Circuit, entered in Case No. 12,797, on February 28, 1969, as aforesaid.

Respectfully submitted,

CHARLES M. LOVE
1101 Security Building
Charleston, West Virginia

JOHN B. FISHER
Hecks Building
Charleston, West Virginia

JOHN A. AMICK
800 Terminal Building
Charleston, West Virginia
Counsel for Petitioner